

BRENDA K. WELLS)	
Claimant)	
)	
VS.)	
)	
WAFFLE HOUSE, INC.)	
Respondent)	Docket No. 264,018
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

² K.S.A. 44-510i.

carriers regularly enforce against providers under contract”³ and as a result, no penalty was due. The ALJ went on to award claimant \$937.50 in attorney’s fees for the time expended by claimant’s counsel in connection with the post- award motion.

Claimant appeals this Order alleging the ALJ erred in refusing to order a penalty under K.S.A. 44-512a. Claimant asserts the documentary evidence offered by respondent to “prove” that the outstanding bills have been paid was legally insufficient. Rather, claimant maintains that the bills referenced in the exhibit proffered at the motion hearing remain unpaid, thus exposing her to unwarranted and continued collection efforts. Claimant requests the Board enter an order granting her a penalty of 10 percent of the value of the outstanding bills.

While the claimant agrees with the ALJ’s determination to award attorney’s fees, her counsel respectfully suggests the appropriate hourly figure should be \$200 rather than the \$125 utilized by the ALJ. Moreover, he maintains that an additional 6 hours of time should be added to the Order, reflecting the additional time and effort expended in the preparation of this appeal.

Respondent and its carrier (respondent) also appeal the ALJ’s Post Award Order. Respondent urges the Board to affirm the ALJ’s Order with respect to the denial of any penalty, but also suggests that an award of attorney’s fees is inappropriate. Rather, as this is a proceeding under K.S.A. 44-512a, attorney’s fees are only available if the action to recover compensation benefits is filed in the district court. Additionally, respondent contends K.S.A. 44-536(g) does not *require* an assessment of attorney’s fees, because respondent has, in its view, paid the outstanding bills subject to the fee schedule and is legally required to pay nothing more, rendering claimant’s motion for penalties “frivolous and without merit”.⁴ Thus, attorney’s fees should not be awarded and are not required under K.S.A. 44-536(g).

The issues to be determined are as follows:

1. Did the ALJ err in failing to assess a penalty under K.S.A. 44-512a?; and
2. Whether the ALJ properly awarded attorney’s fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board concludes that this matter should be remanded to the ALJ.

³ Post Award Decision (Jan. 31, 2005) at 2.

⁴ Respondent’s Brief at 11 (filed Feb. 28, 2005).

Claimant's original award was appealed to this Board and the subject of an Order granting her permanent total disability benefits as well as the payment of her outstanding medical bills. That Order was appealed to the Court of Appeals and was affirmed on August 13, 2004. Included within that Order was a directive that respondent pay all of the medical expenses related to this claim including those which had been delineated on an exhibit which was designated as Claimant's Exhibit 1 at the regular hearing.⁵

On September 30, 2004, a demand was apparently sent to respondent and its counsel.⁶ Unfortunately, that demand is not contained within the file. There are several computer generated receipts⁷ that show some sort of item was mailed to an undisclosed address in Olathe and Topeka, Kansas and delivered on various dates, the most recent being October 21, 2004. However, the contents of the mailings are not contained within the record.

Thereafter, a motion for penalties was filed and scheduled to be heard on January 6, 2005. At this hearing, claimant's counsel represented that he (or his staff) had contacted all but four⁸ of the entities presently billing claimant and confirmed that there was an outstanding balance due and owing. According to counsel's statements at the January 6, 2005 hearing before the ALJ, the following entities have an outstanding balance:

Olathe Medical Services, Inc.	\$ 98.00
Mid-America Psychiatrists	\$ 1,033.90
Neurology Consultants, Chtd.	\$ 185.00
St. Luke's South Hospital	\$10,912.00
Shawnee Mission Medical Center	\$ 237.00
Olathe Medial Center (4 bills)	\$ 1,042.90
	\$ 341.30
	\$ 5,411.90
	\$ 74.00
Neurological Surgery	\$ 3,944.40
Cardiology Services	\$ 24.00

⁵ R.H. Trans., Cl. Ex. 1.

⁶ Motion Hearing Trans. at 5.

⁷ *Id.*, Ex. 2.

⁸ Due to inclement weather, counsel was unable to confirm the status of the bills with Neurological Consultants of Kansas City, United Imaging, Emergency Medical Care and Midwest Anesthesia Associates. Nonetheless, claimant maintains she is continuing to receive past-due bills in a sum consistent with the figures reflected in claimant's exhibit 1. Unfortunately, none of the bills attached to claimant's exhibit 1 have any more recent of a date than 2002.

Claimant's counsel attached copies of the bills which reflect the itemized amounts above. None of the bills are dated later than 2001, although claimant's counsel indicates his client is continuing to receive bills. Claimant's counsel requested not only a penalty for respondent's failure to pay these bills under K.S.A. 44-512a, but also attorney's fees for the 7.5 hours expended in pursuing this post award matter.

In response to these statements, respondent's counsel declared that the bills referenced in claimant's exhibit 1 have been paid pursuant to the statutory fee schedule. Thus, any penalty would have been improper, and as a result, the ALJ's Order should be affirmed on this issue.

In support of this defense, respondent's counsel produced a printout of payments made by the carrier with respect to this claim. Counsel contends his client referred the bills out to a third party for purposes of processing them through the fee schedule, and that if claimant continues to receive any bills, neither she nor respondent is liable. This document was marked as an exhibit at the hearing, relied upon and referred to by both parties, but was never offered or accepted into evidence. In any event, the printout shows that some of the bills referenced by claimant have been paid as recently as December 2004. For example, the \$80.00 bill from Mid America Physiatrists was submitted and paid at the rate of \$55.00 in December 2004. Three of the four Olathe Medical Center bills are contained on respondent's printout and are shown as being paid, again at a reduced rate. One bill from that hospital for \$74.00 is not contained within respondent's ledger. Other bills contained on both claimant's list and respondent's printout show a rather large disparity between the amount of the bill and the amount of respondent's payment. For example, the Shawnee Mission Medical Center bill for \$38,611.85 was paid on November 2, 2004 in the sum of \$14,710.00, which is only 38 percent of the total bill. Respondent explains this disparity on the statutory fee schedule, and maintains it has no further obligation to claimant or the provider for the balances.

Respondent also contends that no penalty is owed because none of the bills tendered by claimant were on the appropriate form as required by the fee schedule authorized by K.S.A. 44-510i.

On January 31, 2005, the ALJ entered an order denying penalties. In doing so, he apparently accepted respondent's representations that the bills reflected on its printout were not only paid as indicated, but that the amounts paid were proper under the fee schedule. Without going through each bill to ensure that those listed by claimant were contained on respondent's ledger, the ALJ concluded the bills were all paid and that no further order was necessary. He denied claimant's request for a penalty, but granted her counsel's claim for attorney fees at the rate of \$125 per hour for 7.5 hours.

The Board has considered this matter and concludes the record contains an insufficient basis upon which it can make a determination. Therefore, the case must be remanded to the ALJ for further proceedings and clarification.

The Workers Compensation Act provides that a worker is entitled to receive a civil penalty when compensation is not paid when due. Whether the claimant is entitled to a civil penalty for unpaid medical bills is controlled by K.S.A. 44-512a(a). The statute requires a written demand to be served on the respondent or its insurance carrier when compensation, including medical compensation, which has been awarded, is not paid and is past due. Such demand must specifically identify the disability compensation or medical compensation that is claimed to be unpaid. If payment of such demand is thereafter refused or is not made within 20 days, a civil penalty shall be paid.

Here, the demands upon which claimant relies and which were apparently sent by claimant's counsel on September 30, 2004, were not included within the record. The receipts for delivery were marked as an exhibit, but the actual demands are not in evidence. Thus, it is impossible to determine whether, in fact, those demands were sufficiently specific to support an award for penalties. The ALJ may have seen them and concluded they were sufficient, but based upon this record and his lack of comment on this issue, particularly when respondent was objecting to the lack of specificity, it is impossible to determine if that was, in fact, the case. For this reason, the matter must be remanded to the ALJ to determine if the demand made on September 30, 2004 was sufficient and met the terms of the statute, K.S.A. 44-512a(a).

Moreover, both parties seem to want to rest upon statements of counsel as evidence of its position in this matter. Claimant's counsel has represented to the Court that his client continues to receive bills from various medical providers, and has represented that he or his office staff called by phone and confirmed that the amounts reflected on the exhibit were presently outstanding. Yet the bills attached to the transcript and identified as exhibit 1 to the transcript all date back to 2000 and 2001. They do not reflect any of the payments that are alleged to have been paid by respondent's carrier, even as recently as 2004.

Similarly, respondent's counsel has represented that the printout marked as exhibit A, reflects payments actually made as well as the further representation that the payments made reflect appropriate amounts under the statutorily mandated fee schedule. K.S.A. 44-510j(h) provides that "[a]ny health care provider. . . which accept the terms of the workers compensation act by providing services or material thereunder shall be bound by the fees approved by the director and no injured employee or dependent of a deceased employee shall be liable for any charges above the amounts approved by the director." It may well be that respondent's carrier engaged the services of an entity that has determined that the amounts paid and reflected on exhibit A are appropriate and that, by law, the providers should no longer be troubling the claimant about the balance. However, it would seem prudent for respondent's counsel to come forward with that evidence rather than just rest on his own personal assurances. Otherwise, the attorney is representing to the factfinder that he, as an officer of the Court, knows that each and every bill has been scrutinized and adjusted in a manner consistent with the fee schedule, something that he might not have the factual basis for asserting.

Distilled to its essence, neither claimant nor respondent met their evidentiary burdens in this matter to a sufficient degree so as to allow a meaningful resolution of the dispute. For that reason, the Board elects to remand this matter back to the ALJ with the following directions:

1. Claimant is to gather and itemize all of the recent bills tendered to her since the Board's Order of September 26, 2003, which she maintains are outstanding and send them to respondent.

2. Respondent is to request, in the appropriate form, bills from all of the providers listed on claimant's itemized list from above.

3. Respondent is to gather and itemize (including copies of the checks) all payments made to medical providers since the inception of this claim.

4. These materials, and any others subsequently deemed necessary, are to be submitted to the medical administrator for the Kansas Division of Workers Compensation, Dr. Terry Tracy, for a determination of what bills have been paid, what bills remain outstanding and whether the outstanding amounts reflect sums in excess of what is allowed by the fee schedule. To the extent there is a dispute between the carrier and the medical services provider, respondent is to follow the process dictated by K.S.A. 44-510j.

5. Dr. Tracy shall tender his report to the ALJ immediately following completion of the process contemplated by K.S.A. 44-510j. At that point, further proceedings can be held before the ALJ at which both parties will be able to address the sufficiency of claimant's demand letter, the bills which remain unpaid, if any, and the penalties due. The ALJ shall also consider the issue of attorney fees in that proceeding, taking into account all the time already spent in connection with this proceeding. In that regard, the Board concurs with the ALJ's determination that an hourly rate of \$125 is reasonable and customary. In the meantime, the ALJ's Order with respect to attorney fees is held in abeyance pending his subsequent Order following the receipt of Dr. Tracy's report.

The Board does not retain jurisdiction over this matter.

WHEREFORE, it is the finding, decision and order of the Board that the above-captioned matter is remanded for proceedings not inconsistent with the directives set forth above.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director